SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER Justice PART 15

Index Number : 653183/2014
FACEBOOK, INC.
vs.
DLA PIPER LLP (US)
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). ohed
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5/11/15
MAY 11 2015

_____ J.S.C.
HON. EILEEN A. RAKOWER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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FACEBOOK, INC. and MARK ELLIOT ZUCKERBERG,

Plaintiffs,

- v -

DLA PIPER LLP (US); CHRISTOPHER P. HALL; JOHN ALLCOCK; ROBERT W. BROWNLIE; GERARD A. TRIPPITELLI; PAUL ARGENTIERI & ASSOCIATES; PAUL A. ARGENTIERI; LIPPES MATHIAS WEXLER FRIEDMAN LLP; DENNIS C. VACCO; KEVIN J. CROSS; MILBERG LLP; SANFORD P. DUMAIN; and JENNIFER L. YOUNG,

Defendants.

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Index No. 653183/2014

DECISION and ORDER

Mot. Seq. #002, #003, #004

HON. EILEEN A. RAKOWER, J.S.C.

This is an action for malicious prosecution and violation of New York Judiciary Law § 487 arising from various law firms and attorneys' alleged participation in a fraudulent breach of contract lawsuit against plaintiffs, Facebook, Inc. ("Facebook") and Mark Elliot Zuckerberg ("Zuckerberg") (collectively, "Plaintiffs"). Non-party Paul Ceglia ("Ceglia") filed the underlying breach of contract action in June 2010 in the Supreme Court of Allegany County, New York, under the caption, *Paul D. Ceglia v. Mark Elliot Zuckerberg and Facebook, Inc.*, No. 10-cv-00569-RJA (W.D.N.Y.) (the "*Ceglia* Action") [1]. Plaintiffs claim that Ceglia forged the purported contract document in issue in that case, and that defendants, DLA Piper (US) ("DLA Piper"), Christopher P. Hall ("Hall"), John Allcock ("Allcock"), Robert W. Brownlie ("Brownlie"), Gerard A. Trippitelli ("Trippitelli") (and together with DLA Piper, Hall, Allcock, and Brownlie, the

[1] The *Ceglia* Action was removed to federal court based upon diversity jurisdiction.

"DLA Defendants"), Paul Argentieri & Associates ("PA&A"), Paul A. Argentieri ("Argentieri") (and together with PA&A, the "Argentieri Defendants"), Lippes Mathias Wexler Friedman LLP ("LMWF"), Dennis C. Vacco ("Vacco"), Kevin J. Cross ("Cross") (and together with LMWF and Vacco, the "Lippes Defendants"), Milberg LLP ("Milberg"), Sanford P. Dumain ("Dumain"), and Jennifer L. Young ("Young") (and together with Milberg and Dumain, the "Milberg Defendants") (collectively, "Defendants"), are various law firms and attorneys who pursued the *Ceglia* Action, on Ceglia's behalf, with knowledge that the subject document was forged.

The DLA Defendants, Lippes Defendants, and Milberg Defendants, (collectively, the "Moving Defendants") now move (Mot. Seq. #002, #003, #004, respectively) for Orders, pursuant to CPLR § 3211(a)(7), dismissing Plaintiffs' complaint against Moving Defendants for failure to state a cause of action as against these defendants.

Plaintiffs oppose.

Oral Argument was heard on Moving Defendants' motions to dismiss on April 21, 2015.

CPLR § 3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true . . . and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep't 2003] [internal citations omitted]; CPLR § 3211[a][7]).

As for Plaintiffs' first cause of action, for malicious prosecution, the tort of malicious prosecution requires proof of: (1) the commencement or continuation of a proceeding by the defendant against the plaintiff; (2) the termination of the proceeding in favor of the plaintiff; (3) the absence of probable cause for the proceeding; and, (4) actual malice. (*Wilhelmina Models, Inc. v. Fleisher*, 19 A.D.3d 267, 269 [1st Dep't 2005] quoting *Broughton v State of New York*, 37 N.Y.2d 451,

457 [1975]). In addition, in order to sustain a cause of action for malicious civil prosecution, the plaintiff must allege and prove "special injury." (*Engel v. CBS, Inc.*, 93 N.Y.2d 195, 201 [1999]). Such legal action may be civil in nature, so long as the action "interferes in some way" with the plaintiff's person or property. (*Purdue Frederick Co. v. Steadfast Ins. Co.*, 40 A.D.3d 285, 286 [1st Dep't 2007]). A malicious civil prosecution, therefore, "is one that is begun in malice, without probable cause to believe it can succeed, and which, after imposing a grievance akin to the effect of a provisional remedy, finally ends in failure." (*Engel v. CBS, Inc.*, 93 N.Y.2d 195, 206 [1999]).

Here, Plaintiffs' complaint alleges that, "in or about June 2010, Ceglia and Argentieri formed a scheme to extort a settlement payment from Facebook by filing a false lawsuit against Facebook based on forged documents claiming Ceglia owned an 84 percent interest in Facebook". (Compl. ¶ 39). Plaintiffs' complaint alleges that on or about June 30, 2010, Ceglia, through Argentieri, filed an action against Facebook in the Supreme Court of Allegany County, New York, seeking damages allegedly owed under the documents in question (the "*Ceglia* Action"). (Compl. ¶¶ 39-40). Plaintiffs' complaint alleges that, in connection with the *Ceglia* Action, Ceglia sought and obtained a temporary injunction against Facebook, which "'enjoined and restrained [Facebook] from transferring, selling, [or] assigning any assets, stocks, [or] bonds, owned, possessed and/or controlled by [Facebook]'". (Compl. ¶¶ 48-49).

Plaintiffs' complaint alleges that the injunction remained in effect after Facebook and Zuckerberg removed the *Ceglia* Action to the United States District Court for the Western District of New York on July 9, 2010. (Compl. ¶ 50). Plaintiffs' complaint further asserts that, "[s]everal lawyers and law firms signed on to help Ceglia pursue his claims, including Aaron H. Marks [('Marks')] of the firm Kasowitz, Benson, Torres & Friedman LLP [('Kasowitz')] in New York City; [the DLA Defendants]; and [the Lippes Defendants]". (Compl. ¶ 58).

However, Plaintiffs' complaint alleges, on March 30, 2011, Marks discovered certain evidence on Ceglia's computer hard drive allegedly proving that the so-called contract in issue in the *Ceglia* Action was forged. (Compl. ¶ 59). Plaintiffs' complaint alleges that Kasowitz communicated these findings to Argentieri and immediately withdrew as counsel for Ceglia. (Compl. ¶ 60). Plaintiffs' complaint alleges that, "[b]eginning on or around March 30, 2011, and continuing through mid-April, Marks repeatedly communicated with his former co-counsel about his findings and stated that he intended to notify the court of the fraud". (Compl. ¶ 61). Plaintiffs' complaint asserts, "prior to April 11, 2011, Marks told attorneys from

DLA Piper [and] Lippes Mathias . . ." about the evidence allegedly recovered from Ceglia's computer. (Compl. ¶ 61).

Additionally, Plaintiffs' complaint alleges that on April 14, 2011, Marks wrote a letter "to several of Ceglia's lawyers to memorialize his prior discoveries and communications regarding [this evidence]". (Compl. ¶ 67). More Speficially, Plaintiffs' complaint asserts:

> The Letter was addressed to Vacco of Lippes Mathias and copied at least Argentieri of Argentieri & Associates, Brownlie and Trippitelli of DLA Piper, and Cross of Lippes Mathias. Marks wrote that, on March 30, [Marks] had seen documents on Ceglia's computer "that *established* that page 1 of the . . . [purported contract] is fabricated."

(Compl. ¶ 67 [emphasis added]). Plaintiffs' complaint further asserts that, in this same letter, "Marks memorialized that he had communicated his findings to Argentieri 'on March 30 and April 4' and in an 'April 12 letter.'" (Compl. ¶ 67).

Plaintiffs' complaint alleges that DLA Defendants and Lippes Defendants entered appearances for Ceglia in the *Ceglia* Action, "[o]n April 11, 2011—after (on information and belief) Marks and the Kasowitz lawyers had notified their co-counsel that they had discovered [evidence of forgery] on Ceglia's [hard drive] and that Ceglia's claims were fraudulent". (Compl. ¶ 62). Plaintiffs' complaint further asserts:

> Also on April 11, 2011, Ceglia's new team of lawyers filed a 25-page amended complaint (the "Amended Complaint") that repeated Ceglia's false claims. The Amended Complaint was signed by Hall of DLA Piper and also listed as counsel Allcock, Brownlie, and Trippitelli ofDLA Piper; Vacco and Cross of Lippes Mathias; and Argentieri. Like the original Complaint, the Amended Complaint attached a copy of the forged [contract document] as an exhibit, represented that the [this document] was authentic, and claimed that Zuckerberg had breached the purported contract.

(Compl. ¶ 63).

Plaintiffs' complaint alleges that the DLA Defendants and the Lippes Defendants actively litigated the *Ceglia* Action until June 28, 2011, when they "abruptly withdrew" as counsel for Ceglia. (Compl. ¶¶ 63-77). During that time, Plaintiffs' complaint asserts, Facebook and Zuckerberg, and Ceglia, filed motions and cross motions for expedited discovery. (Compl. ¶¶ 73-74). Plaintiffs' complaint alleges that, "[t]hroughout the expedited discovery period, Ceglia continued to rotate in different lawyers. On March 5, 2012, Defendants Dumain and Young of Milberg entered appearances in the Ceglia action." (Compl. ¶¶ 92).

Plaintiffs' complaint asserts that on March 26, 2012, Facebook and Zuckerberg moved to dismiss the *Ceglia* Action, and to stay discovery in that action pending a decision on Facebook and Zuckerberg's dispositive motion. (Compl. ¶ 93). Plaintiffs' complaint alleges that Dumain participated in the hearing on Facebook and Zuckerberg's motion to stay discovery. (Compl. ¶ 95). Plaintiffs' complaint asserts, "Dumain and Young moved to withdraw from the Ceglia action on May 30, 2012. During the time period they were counsel of record for Ceglia, they appeared as counsel on various discovery motions." (Compl. ¶ 96).

Plaintiff's complaint also alleges:

> On March 26, 2013, the United States Magistrate Judge presiding over the *Ceglia* action issued a 155-page written opinion recommending that the district court exercise its inherent power to dismiss the case with prejudice. The Magistrate Judge ruled that dismissal was warranted because the purported contract and emails were forgeries, and the entire lawsuit was a massive fraud on the court. He found "it [was] highly probable and reasonably certain that the Work for Hire Document and the supporting e-mails were fabricated for the express purpose of filing the instant action." He further ruled that dismissal was warranted based on Ceglia's contumacious destruction of evidence.

(Compl. ¶ 102). The District Court adopted the Magistrate's recommendation on March 25, 2014. (Compl. ¶ 104).

Accepting Plaintiffs' allegations as true, the four corners of Plaintiffs' complaint adequately plead the commencement or continuation of a proceeding by the Moving Defendants against Plaintiffs; and the termination of that proceeding in

Plaintiffs' favor. Moving Defendants do not dispute these elements. As far as the disputed elements of lack of probable cause and malice are concerned, viewing Plaintiffs' complaint in the light most favorable to Plaintiffs, Plaintiffs' complaint adequately alleges that Moving Defendants knew that the contract in issue in the *Ceglia* Action was forged. Accepting Plaintiffs' allegations as true, Plaintiffs' complaint adequately pleads that Moving Defendants knew that there was no basis—and therefore no probable cause—for Ceglia's claims. (*Chappelle v. Gross*, 26 A.D.2d 340, 343 [1st Dep't 1966]; *see also Crews v. Cnty. of Nassau*, 996 F. Supp. 2d 186, 208 [E.D.N.Y. 2014]). While lack of probable cause and malice are separate elements of a malicious prosecution claim, "a jury may, but is not required to, infer the existence of actual malice from the fact that there was no probable cause to initiate the proceeding." (*Martin v. Albany*, 42 N.Y.2d 13, 17 [1977]). Insofar as Plaintiffs' complaint adequately alleges that Moving Defendants lacked probable cause to pursue the underlying action, the four corners of Plaintiffs' complaint are sufficient to plead the existence of actual malice as against Moving Defendants.

In addition, accepting Plaintiffs' allegations as true, the four corners of Plaintiffs' complaint adequately allege a special injury in the form of a temporary injunction obtained against Facebook in the *Ceglia* Action (the "TRO"). As the Court of Appeals explains, "[s]ince the role that the special injury requirement fulfills is that of a buffer to insure against retaliatory malicious prosecution claims and unending litigation . . . a verifiable burden substantially equivalent to the provisional remedy effect can amount to special injury." (*Engel*, 93 N.Y.2d at 205 [1999]). In other words, "what is "special' about special injury is that the defendant must abide some concrete harm that is considerably more cumbersome than the physical, psychological or financial demands of defending a lawsuit." (*Id.*). The imposition of a provisional remedy is sufficient to meet this standard[2]. (*Id.*).

Moving Defendants argue that they played no role in obtaining the TRO, and that, as a result, Plaintiffs' complaint does not plead a special injury *vis-à-vis* Moving Defendants. Moving Defendants also point out that they did not enter appearances in the *Ceglia* Action until after the TRO was lifted. This raises the question whether a special injury must persist throughout the entirety of a prosecution in order to satisfy the special injury requirement of a malicious prosecution claim. This Court concludes that it does not. Rather, a special injury, once inflicted, constitutes a "concrete harm that is considerably more cumbersome than the physical,

[2] Plaintiffs further argue that Moving Defendants engaged in a campaign a public campaign to cloud title to Facebook, which created a burden on Plaintiffs' business "substantially equivalent" to that imposed by the provisional remedy of a *lis pendens*.

psychological, or financial demands of a lawsuit", whether or not this harm remains in full effect for the duration of the suit. (*Engel*, 93 N.Y.2d at 205).

Moving Defendants' argument also raises a separate question, as to whether a plaintiff may state a claim for malicious prosecution against a defendant who had yet to prosecute the underlying action at the time the alleged special injury took place. A plaintiff may state a claim for malicious prosecution against a defendant who does not commence, but merely continues, an action against the plaintiff. (*Broughton v. State*, 37 N.Y.2d 451, 457 [1975] ["The elements of the tort of malicious prosecution are: (1) the commencement *or continuation* of a . . . proceeding by the defendant against the plaintiff, ..."] [emphasis added]). Similarly, this Court finds that the defendant in an action for malicious prosecution need not institute the requisite special injury, so long as the defendant continues the vehicle in which the special injury took place. Where a defendant continues to prosecute an action in which a special injury has occurred, the special injury requirement's function as a "buffer" against excess litigation is not diminished, provided that the other elements of a malicious prosecution claim are met. (*Engel*, 93 N.Y.2d at 205). Here, accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, Moving Defendants had knowledge of the *Ceglia* Action's procedural history, knew of the TRO, and joined Argentieri Defendants in prosecuting the *Ceglia* Action as it continued.

Accordingly, accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs' complaint adequately plead a cause of action for malicious prosecution against Moving Defendants.

Turning now to Plaintiffs' second cause of action, for violation of New York Judiciary Law § 487, pursuant to Judiciary Law § 487, any attorney or counselor who "is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party" is "guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action." (Jud. Law § 487).

Section 487's "evident intent" is "to enforce an attorney's special obligation to protect the integrity of the courts and foster their truth-seeking function." (*Amalfitano v. Rosenberg*, 12 N.Y.3d 8, 14 [2009]). Thus, allegations that defendant deceived or attempted to deceive the court with fictitious documents may be sufficient to state a cause of action for violation of Judiciary Law § 487. (*Mazel 315 W. 35th LLC v. 315 W. 35th Assoc. LLC*, 120 A.D.3d 1106, 1107 [1st Dep't 2014]

["Plaintiff's evidence showing that defendant presented false assignment documents for recordation in the City Register and sent a letter to the justice stating falsely that his client was the true owner of the notes and mortgages establishes an egregious act of intentional deceit of the court sufficient to support the cause of action."]; *Kurman v. Schnapp*, 73 A.D.3d 435, 435 [1st Dep't 2010] ["Plaintiff stated a cause of action under Judiciary Law § 487 by alleging that defendant deceived or attempted to deceive the court with a fictitious letter addressed to him from the former licensing director of the City's Taxi and Limousine Commission (TLC) that stated, inter alia, that plaintiff was under a lifetime ban on owning any licenses with the TLC."]).

Here, Plaintiffs' complaint alleges that Moving Defendants maintained a breach of contract action as against Facebook and Zuckerberg even though Moving Defendants knew that the contract in issue in that action was a forgery. (Compl. ¶¶ 60-61, 67, 113). Plaintiffs' complaint further alleges that Moving Defendants filed discovery motions and made arguments in court in reliance on the authenticity of a purported contract document that Moving Defendants knew to be forged. (Compl. ¶¶ 74-75; 95-96).

Accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, Plaintiffs' complaint adequately alleges that Moving Defendants deceived or attempted to deceive the court presiding over the *Ceglia* Action with fictitious documents. Accordingly, viewing Plaintiffs' complaint in the light most favorable to Plaintiffs, the four corners of Plaintiffs' complaint are sufficient to state a cause of action for violation of Judiciary Law § 487 as against Moving Defendants, for purposes of surviving a motion to dismiss at this early stage of litigation.

Wherefore it is hereby,

ORDERED that the DLA Defendants' motion (Mot. Seq. #002) to dismiss Plaintiffs' complaint is denied; and it is further

ORDERED that the Lippes Defendants' motion (Mot. Seq. #003) to dismiss Plaintiffs' complaint is denied; and it is further

ORDERED that the Milberg Defendants' motion (Mot. Seq. #004) to dismiss Plaintiffs' complaint is denied; and it further

ORDERED that Moving Defendants are directed to answer Plaintiffs' complaint within 20 days of receipt of a copy of this Order with notice of entry.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: May 11 2015

MAY 11 2015

EILEEN A. RAKOWER, J.S.C.